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## NUI CHAI KIAN v. HASBI OMAR

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[CIVIL APPEAL NO: BA-12B-121-08-2019]
19 APRIL 2021

B

***ROAD TRAFFIC:*** *Accident – Liability – Finding of 100% liability against defendant – Whether right of way to be given to traffic on or approaching from right at roundabout – Whether trial judge interpreted r. 3(2)(a) of Road Traffic Rules 1959 correctly – Whether there was roundabout where accident occurred – Whether*
C *plaintiff liable for contributory negligence – Whether plaintiff held valid driving licence – Whether completed two-year probationary period for grant of driving licence – Whether plaintiff adjusted speed of vehicle while travelling – Whether findings on liability against defendant ought to be varied*

D ***TORT:*** *Negligence – Contributory negligence – Plaintiff failed to equip himself with necessary skill and competence to drive on road – Whether failed to use reasonable care for own safety – Whether contributory cause of accident – Whether reasonably foreseeable that failure to adjust speed of motor vehicle at busy intersection would result in collision with another motor vehicle – Whether plaintiff liable for contributory negligence*

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This was an appeal from the Sessions Court decision by the appellant ('defendant') in a suit brought against her by the respondent ('plaintiff') arising from a motor vehicle accident. The plaintiff's version was that he was driving his motorcycle with the registration number BNR 1390
F ('motorcycle') from his house towards his place of work. At an intersection of the road, while he was riding on the left side of the road and travelling straight, suddenly, the defendant's motorcar which came from the opposite direction, suddenly turned right into Jalan Lot 50, Jalan Serendah 26/17 and hit his motorcycle. However, in his witness statement, the plaintiff stated that he had hit the left-hand side of the defendant's motorcar. During the trial,
G under cross-examination and re-examination, the plaintiff testified that he did not have time to press his brakes and hit the defendant's motorcar. As a result of the collision, the plaintiff fell off his motorcycle and was injured. The defendant's version was that, when she was on the road at Lot 50, Jalan Serendah 26/17, there were a number of vehicles that were making U-turns
H from the opposite direction. The defendant said that, after having ascertained that it was safe to turn into the junction on the right side, she continued driving. As she was turning into the junction, the motorcycle number BNR 1390 came fast from the opposite direction and hit the front of the defendant's car. The Sessions Court Judge ('SCJ') held that the defendant was
I 100% liable for the accident and awarded the plaintiff, general damages in the sum of RM70,000 and special damages in the sum of RM32,939. The defendant appealed against the whole of the decision of the Sessions Court, whilst the plaintiff cross-appealed only against the quantum of damages.

**Held (allowing appeal; setting aside decision of Sessions Court on liability):**

**(1)** The SCJ erred in interpreting r. 3(2)(a) of the Road Traffic Rules 1959 and holding that the defendant was 100% liable for the accident. Rule 3(2)(a) requires for right of way to be given to traffic on or approaching from the right at a roundabout. As there was no roundabout at the intersection, the issue of the defendant giving right of way to traffic approaching from her right at a roundabout did not arise. If indeed that motor vehicles on the right must be given priority regardless of whether there was a roundabout, the plaintiff should have given priority to the defendant who was coming from the right of the plaintiff when she turned her car right into the intersection. (paras 29-31)

**(2)** A person driving a motorcycle, motorcar, motor-lorry of a particular class or description on the road must hold a valid driving licence to drive the motorcycle, motorcar, motor-lorry of the said class or description on the road. The statutory requirement in the RTA for the passing of the prescribed tests of competence and the two-year probationary period as pre-conditions for the grant of the driving licence were to ensure such drivers of motor vehicles 'would not be a source of danger to the public' and to achieve one of the stated objectives of the RTA, namely, 'for the protection of third parties against risks arising out of the use of motor vehicles'. The plaintiff did not hold a valid driving licence and had only been driving his motorcycle on the road for one year at the time of accident. Therefore, the plaintiff had failed to take reasonable care of himself by not equipping himself with the requisite skill and knowledge to drive on the road in failing to take the prescribed test of competence under the RTA. (paras 57, 61, 63, 64 & 77)

**(3)** Contributory negligence means that a plaintiff had contributed towards his own damage, in that, he failed to use reasonable care for his own safety and so, contributed to his own damage. The doctrine of contributory negligence does not depend on the defendant's breach of duty of care to the plaintiff. Instead, it depends on whether: (a) the plaintiff had failed to take ordinary care of himself; and (b) his failure to take ordinary care was a contributory cause of the accident. Taking 'ordinary care of himself' means 'such care as a reasonable man would take for his own safety'. The plaintiff did not slow down when he reached the intersection even though he knew it was busy. It was reasonably foreseeable that if he did not adjust the speed of his motorcycle at the busy intersection, he may be involved in a collision with motor vehicles turning right at the intersection and that harm would be caused to him as a result. (paras 67, 74, 75 & 77)

**(4)** The decision of the SCJ on the liability of the parties in the accident merited the appellate intervention. By reason of the plaintiff's failure to take reasonable care of himself whilst driving through the intersection, his failure to adjust the speed at which he was travelling to suit the conditions at the busy intersection as required by s. 23 of the Highway Code, and his failure to equip himself with the necessary skill and competence, as statutorily required under the RTA, to drive his motorcycle on the roads, the plaintiff was 70% contributorily negligent for the accident and for the loss and damage that he had suffered as a result of the accident. The defendant was 30% liable for the accident. (paras 83-85)

**Case(s) referred to:**

*Benmax v. Austin Motor Co Ltd [1955] 1 All ER 326* ***(refd)***
*China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC* ***(refd)***
*Chock Kek Ling v. Patt Hup Transport Co Ltd & Ors [1965] 1 LNS 25 HC* ***(refd)***
*Clarke v. Edinburgh & District Tramways Co Ltd 1919 SC (HL) 35* ***(refd)***
*Davies v. Swan Motor Co (Swansea) Ltd [1949] 2 KB 291* ***(refd)***
*Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC* ***(refd)***
*Ellerman Lines Ltd v. H & G Grayson Ltd [1919] 2 KB 514* ***(refd)***
*Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC* ***(refd)***
*Govinda Raju & Anor v. Laws [1965] 1 LNS 45 HC* ***(refd)***
*Jones v. Livox Quarries Ltd [1952] 2 QB 608* ***(refd)***
*Lewis & Denye [1939] 1 KB 540* ***(refd)***
*Murugan v. Lew Chu Cheong [1980] 1 LNS 49 FC* ***(refd)***
*Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC* ***(refd)***
*Powell v. Streatham Manor Nursing Home [1935] AC 243* ***(refd)***
*Ruhani Mohiat & Anor v. Abdul Karim Mat Ali & Anor [1993] 3 CLJ 524 HC* ***(refd)***
*Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 1 LNS 202 HC* ***(refd)***
*UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC* ***(refd)***
*Watt (or Thomas) v. Thomas [1947] AC 484* ***(refd)***

**Legislation referred to:**

Road Traffic Rules 1959, r. 3(2)(a)
Road Transport Act 1987, ss. 26(1), 27(2), 29(1), (2), (4A), 30

*For the appellant/defendant - Vishnukumar Ramalingam & Shila Mookerji; M/s Syed Alwi Ng & Co*
*For the respondent/plaintiff - Kumari Kamala N Krishnan; M/s Naht, Guna & Partners*

*Reported by S Barathi*

**JUDGMENT**
(Liability Only)

**Faizah Jamaludin J:**

**Introduction**

**[1]** This is an appeal by Nui Chai Kan ("the defendant"), who was the defendant in a suit brought against her by the plaintiff, Hasbi bin Omar ("the plaintiff"), at the Shah Alam Sessions Court. Both the appellant and the respondent are referred in this judgment as they were in the Sessions Court.

**[2]** The Sessions Court suit stemmed from an accident between the plaintiff's motorcycle and the defendant's car. The learned Sessions Court Judge ("SCJ") in a decision dated 15 August 2019, held that the defendant was 100% liable for the accident and awarded the plaintiff, general damages in the sum of RM70,000 and special damages in the sum of RM32,939.

**[3]** The defendant appealed against the whole of the decision of the Sessions Court and the plaintiff cross-appealed against the quantum of damages only.

**[4]** Both this appeal and the plaintiff's cross-appeal were heard together before this court. At the conclusion of the hearing, I found that the plaintiff was 70% contributorily negligent for the accident and allowed the defendant's appeal on the issue liability. The defendant's appeal and the plaintiff's cross-appeal on the issue of quantum of damages were both dismissed.

**[5]** Dissatisfied with my decision, the plaintiff has filed an appeal to the Court of Appeal against my decision on the issue of liability only.

**[6]** The full reasons for my decision on the issue of liability are set out in judgment.

**The Accident**

**[7]** The accident between the plaintiff and the defendant happened at approximately 8am on 3 June 2016 at the intersection in front of Lot 50, Jalan Serendah 26/17, Seksyen 26 near Kilang Shin-Etsu Electronics (M) Sdn Bhd. The plaintiff was the driver of a Yamaha Y15ZR motorcycle with the registration number BNR 1390 (the "motorcycle") and the defendant was the driver of a Proton Wira car with the registration number CBA 1005 (the "motorcar").

*The Plaintiff's Version Of The Accident*

**[8]** The plaintiff pleaded in his statement of claim that on 3 June 2016 at around 7.40am, he was driving his motorcycle no. BNR 1390 from his house at Lorong 4, Kg Sg Manis, Seksyen 36, Shah Alam 40460, Selangor towards his place of work at KNM Exotic Sdn Bhd at Lorong 17, HICOM Industrial

Area Sector B, Seksyen 26, Shah Alam, Selangor. And that when he was on Persiaran Hulu Selangor, riding on the left side of the road and travelling straight, suddenly the defendant's motorcar came from the opposite direction and turned right suddenly into Jalan Lot 50, Jalan Serendah 26/17, Seksyen 26 and hit his motorcycle.

**[9]** However, in his witness statement the plaintiff stated that he had hit the left-hand side of the defendant's motorcar. And during the trial, under cross-examination and re-examination, the plaintiff testified that he did not have time to press his brakes and hit the defendant's motorcar.

**[10]** As a result of the collision, the plaintiff fell off his motorcycle and was injured. He received treatment at Hospital Shah Alam for his injuries.

*The Defendant's Version Of The Accident*

**[11]** In her defence, the defendant pleaded that on 3 June 2019 at approximately 8am, she was driving her motorcar no. CBA 1005 from Alam Megah towards her place of work at Seksyen 26, Shah Alam. When she was on the road at Lot 50, Jalan Serendah 26/17, Seksyen 26 near Kilang Shin-Etsu Electronics (M) Sdn Bhd, there were a number of vehicles that were making U-turns from the opposite direction. The defendant says after she ascertained that it was safe to turn into the junction on the right side, she continued driving. As she was turning into the junction, a Yamaha Y15ZR motorcycle no. BNR 1390 came from the opposite direction very fast and hit the front of the defendant's car.

**Legal Principles Governing Appellate Intervention**

**[12]** It is trite that an appellate court ought not to intervene with the trial court's conclusion on primary facts unless it is satisfied the trial judge was plainly wrong.

**[13]** In *Watt (or Thomas) v. Thomas* [1947] AC 484, the House of Lords held that it was wrong for the appellate court to reverse the decision of the trial judge on the ground that the appellate court took a different view from the trial judge of "the facts disclosed by the evidence given at the original hearing and of inferences properly drawn therefrom". In that case Mr Murray Thomas brought an action against his wife Mrs Janet Thomas (formerly Watt) for divorce on the ground of cruelty. The trial judge refused Mr Thomas a divorce. On appeal, the appellate court (Scotland's Second Division of the Court of Session) reversed the trial judge's decision mainly on the ground that they took a different view on the facts disclosed by the evidence at the trial and inferences drawn from those facts.

**[14]** The House of Lords allowed Mrs Thomas' appeal against the decision of Scotland's Second Division of the Court of Session. Lord Thankerton in his judgment explained the duty of the appellate court in regard to the decision of a judge on a question of fact, as follows:

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I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, *an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;*

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II. *The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;*

C

III. *The appellate court,* either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, *may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.* It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question. It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves; and, further, within that class, cases of alleged cruelty will afford an even stronger example of such an advantage. (emphasis added)

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**[15]** In that case, Mr Thomas had alleged cruelty against Mrs Thomas. Lord Thankerton went on to say in relation to the allegation of cruelty:

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Normally the cruelty is alleged to have occurred within the family establishment, and the physique, temperament, standard of culture, habits of verbal expression and of action, and the interaction between the spouses in their daily life, cannot be adequately judged except by seeing and hearing them in the witness box. The law has no foot rule by which to measure the personalities of the spouses. In cases such as the present, it will be almost invariably found that a divided household promotes partisanship, and it is difficult to get unbiased evidence.

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**[16]** Lord Thankerton quoted a passage from the judgment of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36, which was quoted with approval by Viscount Sankey LC in *Powell v. Streatham Manor Nursing Home* [1935] AC 243, 250, where Lord Shaw said:

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In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? *If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.*

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(emphasis added)

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**[17]** The House of Lords decision in *Watt (or Thomas) v. Thomas* (*supra*) was cited by the Federal Court in *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517; [1996] 2 AMR 2233, where Mohamed Dzaiddin FCJ (as he then was) after referring to the passage of Lord Thankerton's judgment, quoted in para. [14] above, held that:

> On the other hand, there is a clear authority also from the House of Lords – and followed by the Privy Council – which says that *a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former.* (emphasis added)

**[18]** The authority referred to by Mohamed Dzaiddin FCJ was the speech of Lord Reid in the House of Lords' decision in *Benmax v. Austin Motor Co Ltd* [1955] 1 All ER 326, followed later by the Privy Council in the Singapore case of *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] 1 LNS 202; [1964] 1 MLJ 87 at p 94. At p 329, of *Benmax v. Austin Motor Co Ltd* (*supra*), Lord Reid held:

> *Watt (or Thomas) v. Thomas* [1947] 1 All ER 582 was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. *But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.* (emphasis added)

**[19]** In *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, the Federal Court explained that pursuant to the "plainly wrong test", an appellate court is entitled to examine the process of evaluation of evidence by the trial court and that a decision by the trial court without judicial appreciation of evidence may be set aside on appeal.

> [14] In our view, the Court of Appeal in citing these cases had clearly borne in mind *the central feature of appellate intervention, ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court.* Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and,

for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. *The Court of Appeal further reiterated the principle central to appellate intervention, ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.* (emphasis added)

**[20]** The use of this test for appellate intervention was reiterated by the Federal Court in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 and in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441. Azahar Mohamed FCJ (as he then was) in *Dream Property* held that:

[60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is "the plainly wrong test" principle; see the Federal Court in *Gan Yook Chin & Anor (P) v. Lee Ing Chin @ Lee Teck Seng & Anor* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (at p. 10) per Steve Shim CJSS. More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v. Genisys Integrated Engineers Pte Ltd* [2010] 9 CLJ 785 where it was held at p. 800:

> It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. **A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence.** (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309). (emphasis added)

## Analysis

**[21]** After full trial at the Shah Alam Sessions Court, the learned SCJ held that the defendant was 100% liable for the accident.

**[22]** The learned SCJ had written two grounds of judgments in respect of his decision. In the first grounds of judgment ("alasan penghakiman") dated 10 October 2019, the learned SCJ gave the reasons for his decision only in respect of the quantum of damages awarded. He did not give any reasons for his decision in respect of the liability of the parties. He then wrote a second grounds of judgment ("alasan penghakiman tambahan") dated 3 January 2020 giving the reasons as to why the defendant 100% liable for the accident.

**[23]** Therefore, for purposes of this appeal by the defendant against the learned SCJ's finding of liability, this court will only consider his reasons for the finding of liability as written in the alasan penghakiman tambahan.

**[24]** The learned SCJ in para. 24 of his alasan penghakiman tambahan held that the fact that the defendant had turned right was proven by the plaintiff. And in para. 25, he held that the fact that the plaintiff was in his right of way was not challenged by the defendant.

**[25]** However, with respect to the learned SCJ, the issues in dispute before the Sessions Court were not that the defendant had turned right at the intersection or that the plaintiff was travelling in his right of way. Both these facts were not challenged by the defendant.

**[26]** The issues in contention during the trial were:

(i) whether the plaintiff should have slowed down at the intersection;

(ii) whether the plaintiff should have been careful to ensure that there were no cars turning right at the intersection before proceeding with his direction of travel at the intersection; and

(iii) whether the defendant had maintained a proper look-out before turning right at the intersection.

**[27]** The learned SCJ in para. 21 of his alasan penghakiman tambahan held that the defendant is governed by s. 18 of the Highway Code, which states as follows:

> TURNING
>
> 18. When turning, drivers must always give way to through traffic, including pedestrian traffic.
>
> When turning right on a police-controlled crossing, go around the policeman into the correct line of traffic. Where there is no policeman, behave as if there is one.

**[28]** The learned SCJ held that based on r. 3(2) of the Road Traffic Rules 1959 (LN 166/1959), the defendant had an obligation to give right of way to any vehicle on his right and also to any vehicle travelling straight. Rule 3(2) of the Road Traffic Rules 1959 states:

> 3. Keeping to the left
>
> (2) The driver of each and every vehicle when driven on a road shall:
>
> (a) give right of way to traffic on or approaching from his right at any roundabout;
>
> (b) give right of way to traffic travelling straight ahead before turning across the path of such traffic;

**[29]** In para. 40 of his alasan penghakiman tambahan, the learned SCJ concluded that the defendant failed to comply with r. 3(2) of the Road Traffic Rules 1959 and held that he is 100% liable for the accident. He stated:

> [40] Berbalik kepada versi yang disandarkan oleh pihak Plaintif, umum mengetahui bahawa ketika melalui kawasan persimpangan adalah menjadi tanggungjawab penguna-pengguna jalanraya untuk memastikan laluan yang hendak dilalui itu adalah selamat untuk dilalui sebelum meneruskan perjalanan. Selain daripada itu keutamaan haruslah diberikan kepada

kenderaan yang berada di sebelah kanan dan juga yang sedang melalui jalan lurus. Peraturan ini telah pun diperuntukkan di dalam Kaedah 3(2) Kaedah-Kaedah Lalu Lintas 1959. Berdasarkan kepada keterangan-keterangan yang telah dikemukan di dalam perbicaraan, Mahkamah mendapati Defendan di dalam tindakan ini telah gagal untuk mematuhi peraturan di bawah Kaedah 3(2) Kaedah-Kaedah Lalu Lintas 1959. Dalam keadaan yang sedemikian Mahkamah berpendapat pihak yang perlu dipersalahkan adalah pihak Defendan.

[41] … melalui bukti-bukti yang dikemukakan Mahkamah mendapati alegasi pihak Defendan telah gagal dibuktikan dan seterusnya Mahkamah memutuskan Defendan bertanggungan cuai pada kadar 100%.

**[30]** With respect, I find that the learned SCJ had erred in his interpretation of r. 3(2)(a) of the Road Traffic Rules 1959. The said rule states: "The driver of each and every vehicle when driven on a road shall (a) give right of way to traffic on or approaching from his right at any roundabout".

**[31]** In this case, there was no roundabout at the intersection, so the issue of the defendant giving right of way to traffic approaching from her right at a roundabout does not arise. It was clearly wrong for the learned SCJ to state under r. 3(2)(a) of the Road Traffic Rules 1959 "keutamaan haruslah diberikan kepada kenderaan yang berada di sebelah kanan". Rule 3(2)(a) requires for right of way to be given to traffic on or approaching from the right at a roundabout. If indeed, as held by the learned SCJ, that motor vehicles on the right must be given priority regardless whether there is a roundabout, the plaintiff should have given priority to the defendant who was coming from the right of the plaintiff when she turned her car right into the intersection.

**[32]** Furthermore, although at the start of para. 40 of his alasan penghakiman tambahan, the learned SCJ stated that it is publicly known that when driving through an intersection it is the obligation of road users to ensure that the route is safe before continuing the journey, the learned SCJ placed the obligation to be careful at an intersection squarely on the defendant. In para. 24 of his alasan penghakiman tambahan, the learned SCJ held that "mahkamah berpendapat bahawa defendan telah membelok ke arah kanan adalah fakta yang telah dibuktikan oleh pihak plaintif". And in para. 25, the learned SCJ goes on to hold "Dengan pembuktian ke atas fakta tersebut, ianya juga menunjukkan plaintif ketika kejadian sememangnya berada di laluannya yang sah".

**[33]** The learned SCJ did not take into account the investigating officer ("IO") testimony that right turns are permitted at the intersection. Nor did he consider the plaintiff's evidence that he did not slow down the speed of his motorcycle even though he knows from driving through the intersection daily that it is a very busy intersection.

**[34]** The learned SCJ also failed to take into account that the plaintiff, as a road user had an obligation under the Highway Code when approaching the intersection to ensure that the road was safe before crossing the intersection. It is clear from reasons set out in the alasan penghakiman tambahan that the learned SCJ did not to take into account s. 23 of the Highway Code.

**[35]** Section 23 of the Highway Code states the following as regards speed:

> SPEED
>
> 23. A good driver adjusts his speed to road conditions, so that he will not lose control of his vehicle or cause a collision.
>
> Reduce your speed upon approaching built-up areas, schools, school buses, children, stretches of winding roads, bends, brows of hills or situations with limited visibility.

**[36]** The learned SCJ also did not consider that the plaintiff's admission that because of the rows of cars in the right lane waiting to do the U-turn, he should have been more careful.

**[37]** As for the defendant's testimony that she had stopped at the intersection, that she had indicated that she was turning right and that she had ascertained that there were no motor vehicles, the learned SCJ in para 27 of the alasan penghakiman tambahan quoted a sentence from Raja Azlan Shah J's (as HRH then was) judgment in the case of *Govinda Raju & Anor v. Laws* [1965] 1 LNS 45; [1966] 1 MLJ 188, where His Lordship held "On the facts the defendant had failed to keep a proper lookout before he swerved to the right and therefore was negligent".

**[38]** The learned SCJ quoted in para. 28 of the alasan penghakiman tambahan part of a sentence of Chang Min Tat FJ's judgment, sitting as a High Court Judge, in the case of *Murugan v. Lew Chu Cheong* [1980] 1 LNS 49; [1980] 2 MLJ 139 at 140, which was appealed to the Federal Court. It is curious why the learned SCJ chose to quote only part of a sentence of the High Court's judgment and not the whole sentence. Also, why did he quote the decision of the High Court which was being appealed against rather than the judgment of the Federal Court. Chang Ming Tat FJ sitting as a High Court Judge after analysing the evidence of the motorcyclist's evidence that he had crossed to the right to other side of the road and presented itself its offside to the car causing the collision, said the following:

> The damages establish, in my view, with some certainty, that the collision occurred when the motor-cycle presented its offside to the car, in other words, when the motor-cycle was travelling at right angles to the car. Since before this stage was reached, the car had been pulled to the other side of the road and brakes applied, the other conclusion must, in my view, be that the motor-cycle had cut across the road in circumstances which gave no room or chance to the car to pass it on its left but which

compelled the car to pull sharply to the right as the only possible way to get round the motor-cycle and avoid a collision. ... Rule 18 may not be strictly relevant, but with respect, I should have thought that the prudence advocated in that rule must be extended to require *that a road user must have regard for his own safety and the safety of others as not to turn to his right unless he can be reasonably certain that he could do so without causing traffic coming up from behind to run into him or without putting such traffic into emergency action.* If he does so in circumstances which gave the motor-car no chance whatsoever, whatever the driver did, to avoid the collision, the blame, in my view, must lie entirely on him. To my mind, this was such a case. (emphasis added)

**[39]** The learned SCJ quoted in his judgment only the words that are italicised above of that paragraph of Chang Ming Tat FJ's judgment.

**[40]** The Federal Court in *Murugan* (*supra*) had dismissed the appeal against Chang Ming Tat FJ's judgment on the following grounds:

In so far as it concerns this appeal *it is abundantly clear that the learned trial judge had made a thorough and complete analysis of all the material evidence available before he made specific findings of fact and we are satisfied that he drew proper inferences of fact and had made appropriate assessment of the witnesses's credibility.* The appellant has failed, in our view, to establish that there was any error of fact or law or that there was a misdirection of himself by the judge to warrant a revision of his decision.

In consideration we feel that there is no ground whatever to justify this court to interfere with the decision of the trial judge. We therefore, dismiss the appeal with costs. (emphasis added)

**[41]** In contrast to Chang Ming Tat FJ in *Murugan*, the learned SCJ did not make a thorough and complete analysis of all the material evidence before arriving at the specific finding of fact the defendant was negligent.

**[42]** In this instant case, the learned SCJ after concluding that the plaintiff had the right of way in accordance with Road Traffic Rules 1959 and quoting excerpts of the judgments in *Govinda Raju* (*supra*) and *Murugan*, and without analysing any other material fact or testimonies of the witnesses, made the finding in para. 29 of the alasan penghakiman tambahan that defendant was clearly negligent.

**[43]** The learned SCJ went on to state in para. 30 of the alasan penghakiman tambahan that he also took into consideration that the defendant was fined by the police and that the IO had testified that from his investigation he had found that the defendant was negligent and wrong.

[30] Dari aspek yang lain, Mahkamah di dalam menimbangkan tuntutan Plaintif turut mengambil maklum bahawa Defendan juga telah disaman oleh pihak polis. SP1 ketika memberikan keterangan telah memaklumkan hasil daripada siasatan yang dijalankan beliau mendapati Defendan selaku pemandu motokar telah melakukan kecuaian dan kesalahan. Oleh yang demikan Defendan dikenakan saman.

**[44]** However, the notes of proceedings show that the IO never testified during the trial, nor did he state in his witness statement that he found that the defendant was negligent or wrong. In Q&A 9 of his witness statement, all the IO said was that the police had issued a summons against the driver of car no. CBA 1005 – "Ya, Saman telah dikeluarkan terhadap pemandu motokar no. CBA 1005".

**[45]** Interestingly, the excerpt of Raja Azlan Shah J's judgment in *Chock Kek Ling v. Patt Hup Transport Co Ltd & Ors* [1965] 1 LNS 25; [1966] 1 MLJ 120, which the learned SCJ had quoted, is authority for the legal principle the fact a defendant had pleaded guilty to driving without due care and attention in respect of an accident is "not conclusive evidence" of the defendant's negligence – it is admissible admission which supports the plaintiff's case, and which weighs against the defendant.

**[46]** However, in this instant case, the learned SCJ said the IO had testified that the defendant was negligent and wrong – when there was no such evidence in the IO's witness statement or his oral testimony during the trial. All the IO stated in his witness statement was that the police had issued a summons against the driver of motorcar no. CBA 1005, which is the defendant's motorcar.

**[47]** Thus, it is curious how the learned SCJ arrived at the conclusion based on the available evidence that IO had testified that he found that the defendant as the driver of the motorcar was negligent and wrong.

**[48]** He did not consider the defendant's evidence that she had maintained a proper look-out and he also did not take into account the IO's testimony that the right turns were permissible at the intersection before arriving at the finding of fact that the defendant was 100% liable for the accident.

**[49]** The learned SCJ also did not address or consider the discrepancy between the plaintiff's pleaded case and his testimony during the trial. In his statement of claim, the plaintiff pleaded that when he was on Persiaran Hulu Selangor, riding on the left side and travelling straight, suddenly the motorcar no. CBA 1005 came from the opposite direction and turned right suddenly into Jalan Lot 50, Jalan Serendah 26/17, Seksyen 26. And as a result, the defendant had blocked his right of way and the defendant's car had hit the plaintiff's motorcycle. In para. 3 of his statement of claim, the plaintiff pleaded that the defendant had hit his motorcycle – he said "Defendan telah menghalang laluan sah plaintif lalu melanggar motosikal plaintif".

**[50]** However, in his witness statement the plaintiff stated that he had hit the left-hand side of the defendant's motorcar. He stated in Q&A 3 of his witness statement "saya cuba membrek dan mengelak tetapi terlanggar juga bahagian tepi kiri motokar tersebut". Under cross-examination, the plaintiff said that he did not have time to press his brakes and hit the defendant's

motorcar. His testimony during cross-examination is consistent with his testimony during re-examination by his counsel. When asked by his counsel, the plaintiff answered "Memang tiba-tiba. Sebab itu saya tidak sempat brek dan terus melanggar dia".

*Requirement For Driving Licence Under Road Transport Act 1987*

**[51]** As stated in its preamble, the Road Transport Act 1987 ("RTA") is:

> *An Act to make provision for the regulation of motor vehicles and of traffic on roads and other matters with respect to roads and vehicles thereon; to make provision for the protection of third parties against risks arising out of the use of motor vehicles;* to make provision for the co-ordination and control of means of and facilities for transport; to make provision for the co-ordination and control of means of and facilities for construction and adaptation of motor vehicles; and to make provision for connected purposes. (emphasis added)

**[52]** In making provision for "the protection of third parties against risks out of the use of motor vehicles", the RTA expressly stipulates that in order for a person to drive a motor vehicle of any class or description on a road, that person must hold a driving licence authorising him to drive a motor vehicle on the road. Section 26(1) of the RTA states:

> (1) Except as otherwise provided in this Act, no person shall drive a motor vehicle of any class or description, on a road unless he is the holder of a driving licence authorising him to drive a motor vehicle of that class or description, and no person shall employ or permit another person to drive a motor vehicle on the road unless the person so employed or permitted to drive is the holder of such a driving licence.

**[53]** On a person's application for a driving licence, the Director of Road Transport ("DRT") may only grant a person a driving licence subject to the Part of the RTA "as to tests of competence to drive and as to the physical fitness of applicants for driving licences": see s. 27(2) of the RTA.

**[54]** Section 29(2) empowers the DRT to grant a person a learner's driving licence ("L-Licence") under s. 29(2) of the RTA "for the purpose of enabling a person to learn to drive a motor vehicle with a view to passing a test under this s. 29". Once the person has been granted with a learner's driving licence by the DRT, that person can then learn how to drive a motor vehicle.

**[55]** Once that person holding an L-Licence passes "the prescribed tests of competence", the DRT shall then grant him a probationary licence ("P-Licence"). Section 29(4A) of the RTA states:

> (4A) Where the person who is holding a learner's driving licence passes the prescribed tests of competence, the Director shall grant him a probationary driving licence and such licence shall be in the prescribed form and subject to the prescribed conditions and shall be valid for two years.

**[56]** After one year of holding a P-Licence, a person can then apply for a driving licence. Pursuant to s. 29(1) of the RTA, a person will be granted with a driving licence if he satisfies the DRT that he has, among others, "held a probationary driving licence for a period of two years and make the application for the driving licence with one year from the expiry of that period".

**[57]** As can be seen from the aforementioned sections of the RTA, a person driving a motorcycle, motorcar, motor-lorry of a particular class or description on the road must hold a valid driving licence granted by the DRT to drive the motorcycle, motorcar, motor-lorry of the said class or description on the road.

**[58]** In order to obtain the driving licence, the RTA expressly states that:

(i) a person must apply for an L-Licence;

(ii) once he holds the L-Licence, a person can then learn to drive a motor vehicle;

(iii) once the person passes the prescribed test of competence to drive and as to the physical fitness under the RTA, the DRT can then grant him a P-Licence, which is valid for a period of two years;

(iv) after the holding the P-Licence for one year, the person can apply to the DRT for a driving licence; and

(v) the DRT will grant a person a driving licence if he satisfies the DRT that he has held a P-Licence for a period of two years, and he has not been disqualified from holding or obtaining a driving licence.

**[59]** Pursuant to s. 30 of the RTA when applying for a driving licence, the applicant must make a declaration as to whether or not he is suffering from "any such disease or physical disability" which would be likely to cause the driving by him of a motor vehicle as he would be authorised by the driving licence to drive, "to be a source of danger to the public".

**[60]** The RTA provides a period of more than two years from the time a person applies for a L-Licence before he is granted a driving licence to drive a motor vehicle on the road, during which period that person must learn how to drive and to pass the prescribed test of competence. After he has passed the prescribed test of competence, he will be granted a P-Licence. And only after two years of holding the P-Licence, will he be granted a driving licence, provided he applies for the driving licence and is not disqualified from holding or obtaining a driving licence.

*Plaintiff Never Taken Driving Test And Does Not Have Driving Licence*

**[61]** In this case, the IO's evidence is that the plaintiff does not hold a valid driving licence to drive his motorcycle on the road. The plaintiff admits that he does not have a driving licence and he has never taken the prescribed test of competence under the RTA. He also told the Sessions Court that he had only been driving his motorcycle on the road for one year at the time of accident.

**[62]** The learned SCJ in para. 32 of his alasan penghakiman tambahan stated that although the plaintiff does not have a driving licence, it does not mean than the defendant doesn't have a duty of care towards the plaintiff and that it doesn't deny the defendant's liability towards him. However, with respect to the learned SCJ, he failed to take into account the fact that the plaintiff, as a driver of a motorcycle on the roads, also has a duty of care towards himself and other users of the roads.

**[63]** By his own testimony, the plaintiff had only driven his motorcycle for one year at the time of the accident, which is less than the two-year probationary period after a person passes the prescribed tests of competence under the RTA. Hence, it is reasonable to conclude that the plaintiff is not equipped with the minimum skill and competence prescribed under the RTA in order "not to be a source of danger to the public."

**[64]** The statutory requirement in the RTA for the passing of the prescribed tests of competence and the two-year probationary period as preconditions for the grant of the driving licence are provisions to ensure such drivers of motor vehicles "would not be a source of danger to the public" and to achieve one of the stated objectives of the RTA, namely, "for the protection of third parties against risks arising out of the use of motor vehicles".

**[65]** With respect to the learned SCJ, the obligation to comply with the Highway Code and the Road Traffic Rules 1959 is applicable on all drivers of motor vehicles on the roads. Similarly, the obligation to take care on the roads so as not to cause harm to other users of the road, is a duty of all road users – it is not just the defendant's duty towards the plaintiff as the learned SCJ had concluded in para. 32 of his alasan penghakiman tambahan.

*Was The Plaintiff Contributorily Negligent?*

**[66]** From the alasan penghakiman tambahan, it is clear that the learned SCJ did not analyse the evidence to determine whether or not the plaintiff was contributorily negligent, even though raised by the defendant.

**[67]** It is settled law that contributory negligence means that a plaintiff had contributed towards his own damage, in that he failed to use reasonable care for his own safety and so contributed to his own damage. Contributory negligence does not mean that a plaintiff commits a breach of duty towards

a defendant: see *Clerk & Lindsell on Torts*, 12th edn., Sweet & Maxwell, referring to *Ellerman Lines Ltd v. H & G Grayson Ltd* [1919] 2 KB 514 at 535; and [1920] AC 466 at 477; *Lewis & Denye* [1939] 1 KB 540 at 544; *Davies v. Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 at 309; *Jones v. Livox Quarries Ltd* [1952] 2 QB 608 at 615.

**[68]** The Federal Court in *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324 held that the learned High Court Judge had applied the correct test in determining whether there was contributory negligence. Syed Agil Barakbah FJ at p. 304 (CLJ); p. 327 (MLJ) held:

> The learned Judge applied the correct test in that the appellant had failed to prove that *the respondent did not on his own interest take reasonable care of himself and contributed by that want of care to his own injury. (Lewis v. Denyé [1939] 1 All ER 310). The test for contributory negligence in the case of a pedestrian is not whether he is under a duty of care towards the Defendant, but whether he was acting as a reasonable man and with reasonable care.* (Per Denning LJ in *Davies v. Swan Motor Co* [1949] 1 All ER 620). (emphasis added)

**[69]** In *Ong Ah Long*, the Federal Court referred to an English Court of Appeal case of *Lewis v. Denyé* [1939] 1 All ER 310, where the court held:

> In order to establish the defence of contributory negligence, the Defendant must prove *(i) that the Plaintiff failed to take "ordinary care for himself,"* or, in other words, such care as a reasonable man would take for his own safety, and *(ii) that his failure to take care was a contributory cause of the accident. The doctrine of contributory negligence "cannot be based upon a breach of duty to the negligent defendant": Craze v. MeyerDumore Bottlers' Equipment Co Ltd, Salmond on Torts*, 9th Edn, at pp 472, 473, and *Grayson (H & C) v. Ellerman Line Ltd*, per Atkin LJ, at pp 535, 536. (emphasis added)

**[70]** In *Jones v. Livox Quarries LD* [1952] 2 QB 608, Lord Denning said the following as regards contributory negligence:

> *Although contributory negligence does not depend on a duty of care, it does depend on foreseeability.* Just as actionable negligence requires the foreseeability of harm to others, *so contributory negligence requires the foreseeability of harm to oneself.* A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.
>
> Once negligence is proved, then no matter whether it is actionable negligence or contributory negligence, the person who is guilty of it must bear his proper share of responsibility for the consequences. *The consequences do not depend on foreseeability, but on causation. The question in every case is: What faults were there which caused the damage? Was his fault one of them?* (emphasis added)

**[71]** The test in *Jones v. Livox Quarries LD*, was adopted by Lamin J (as he then was) in *Ruhani Mohiat & Anor v. Abdul Karim Mat Ali & Anor* [1993] 3 CLJ 524; [1993] 2 AMR 1339; [1993] MLJU 596. A

**[72]** Therefore, in this case, the question before the Sessions Court was whether the plaintiff failed to take ordinary care of himself; and whether his failure was a contributory cause of the accident? It is trite that the doctrine of contributory negligence "cannot be based upon a breach of duty to the negligent defendant": see the Federal Court's decision in *Ong Ah Long* (*supra*). However, in the learned SCJ held in para. 32 of his alasan penghakiman tambahan "sungguhpun plaintif tidak memiliki, ini tidak bermakna defendan tidak mempunyai tanggungjawab berjaga-jaga (duty of care) terhadap plaintif". B C

**[73]** With respect, the learned SCJ's statement that although the plaintiff did not have a driving licence it does not mean that the defendant did not owe him a duty of care, shows that the learned SCJ did not have a judicial appreciation of the principles of contributory negligence. D

**[74]** Pursuant to the doctrine of contributory negligence, whether or not a plaintiff is contributory negligent for a damage he suffered does not depend on the defendant's breach of duty of care to the plaintiff. Whether or not a plaintiff is contributorily negligent for the loss or damage he had suffered, depends on whether: E

(i) the plaintiff had failed to take ordinary care of himself; and

(ii) his failure to take ordinary care was a contributory cause of the accident.

Taking "ordinary care of himself" means "such care as a reasonable man would take for his own safety": see *Lewis v. Denyé* [1939] 1 All ER 310, which was cited by the Federal Court with approval in *Ong Ah Long* (*supra*). F

**[75]** We know from the plaintiff's own testimony that he did not slow down when he reached the intersection even though he knew it was busy. He admitted that he should have been careful when at the intersection. And in contrast to his pleadings, the plaintiff testified during the trial that his motorcycle had hit the defendant's car as he did not have time to apply his brakes. G

**[76]** Hence, the questions that the learned SCJ as the trial judge should have asked himself in deciding whether or not the plaintiff was contributorily negligent are: H

(i) whether the plaintiff when travelling through the intersection, which he knows is busy in the morning, ought to have reasonably foreseen the possibility of him being involved in an accident if he was not careful; I

A (ii) whether the plaintiff should have taken care when travelling through the said intersection?

(iii) whether the plaintiff should have adjusted his speed to the busy road conditions at the intersection, so that he will not lose control of his vehicle or cause a collision as required under s. 23 of the Highway
B Code?; and

(iv) whether the plaintiff should have equipped himself with the skill and knowledge required under the RTA before driving his motorcycle on the roads?

C **Findings Of This Court**

**[77]** For the reasons above, this court finds that it can be reasonably concluded that the plaintiff had failed to take reasonable care of himself by not equipping himself with the requisite skill and knowledge to drive on the road in failing to take the prescribed test of competence under the RTA. It
D is also reasonably foreseeable that if he did not adjust the speed of his motorcycle at the busy intersection, he may be involved in a collision with motor vehicles turning right at the intersection and that harm will be caused to him as a result. By failing to adjust his speed at the intersection, the plaintiff had failed to comply with s. 23 of the Highway Code which requires
E him to "adjust his speed to road conditions, so that he will not lose control of his vehicle or cause a collision".

**[78]** It is clear from the alasan pengakiman tambahan, the learned SCJ did not conduct a thorough and complete analysis of all the material evidence available before he made specific findings of fact in this case. With respect
F to the learned SCJ, arriving at a finding of liability based on the fact that the defendant had turned right into the intersection and was summoned by the police for the accident and the portions of case law quoted in alasan penghakiman tambahan, without analysing all the material facts of this case and without analysing the applicability of the legal principles promulgated
G in those case law quoted, to the facts at hand, does not amount to a thorough and complete analysis of the evidence available to the court.

**[79]** The learned SCJ was plainly wrong not to take into account that the Road Traffic Rules 1959 and the Highway Code applies equally to the plaintiff and the defendant as road users, and not just to the defendant alone.

H

**[80]** The learned SCJ was also plainly wrong not to consider the plaintiff's testimony that he had never taken the statutorily prescribed test of competence under the RTA; that he did not adjust his speed at the intersection even though he knew the intersection was busy and there were cars turning right into the intersection from the opposite direction, as
I required by s. 23 of the Highway Code.

**[81]** Additionally, the learned SCJ was plainly wrong for not taking into consideration the IO's testimony that right turnings were permitted at the intersection and for having dismissed out of hand the defendant's testimony, without even considering the veracity of her testimony, that she had maintained a proper look-out before turning right at the intersection. It is clear from his alasan penghakiman tambahan, the learned SCJ's basis for dismissing the defendant's testimony was not from his observance of the defendant's demeanour or her credibility or reliability as a witness, but from the fact that the defendant was summoned by the police for the accident, even though the law is clear that a defendant's guilty plea to a charge of driving without due care and attention in respect of a road accident is not conclusive evidence of the defendant's negligence: see Raja Azlan Shah J's *dicta* in *Chock Kek Ling v. Patt Hup Transport Co Ltd & Ors* (*supra*).

**[82]** Furthermore, the learned SCJ was wrong not to consider the discrepancy between the plaintiff's pleadings and his testimony as to who had hit who during the collision. It is trite law that parties are bound by their pleadings. He failed to analyse whether it was the defendant's car that had hit the plaintiff's motorcycle as the plaintiff had pleaded in his statement of claim or was it the plaintiff's motorcycle that had hit the defendant's car as the plaintiff had testified during the trial?

**[83]** Accordingly, by reason of the learned SCJ's failure to conduct a thorough and complete analysis of the material evidence of this case, his insufficient judicial appreciation of the facts and the applicable law, this court finds that the learned SCJ's decision on the liability of the parties for the accident merits appellate intervention.

**[84]** Based on the available evidence, this court finds that by reason of the plaintiff's failure to take reasonable care of himself whilst driving through the intersection, his failure to adjust the speed at which he was travelling to suit the conditions at the busy intersection as required by s. 23 of the Highway Code, and his failure to equip himself with the necessary skill and competence to as statutorily required under the RTA to drive his motorcycle on the roads, the plaintiff is 70% contributorily negligent for the accident and for the loss and damage that he had suffered as a result of the accident.

**[85]** Accordingly, this court finds the defendant to be 30% liable for the accident and the plaintiff to be 70% contributorily negligent for the accident.

**[86]** The defendant's appeal as to liability is, therefore, allowed. The learned SCJ's decision as to liability is hereby set aside.